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Sales--Persons Protected by Warranties Under the Uniform Commercial Code--Employee of Buyer Held Not Protected

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Kellas, 122 S.E.2d 177 (W. Va. 1960), the court stated that, to resist a motion for summary judgment, the opposing party must present some evidence to indicate that the facts are in dispute and that the mere contention that the issue is disputable is not sufficient.

Although Federal Rule 56 applies to all civil cases, the courts have been reluctant to use summary judgment procedure in many instances, particularly where an issue of public moment was involved. *Poller v. Columbia Broadcasting System, Inc.*, *supra*; *Kennedy v. Silas Mason Co.*, *supra*; *Pacific American Fisheries v. Mul-laney*, 191 F.2d 137 (9th Cir. 1951). These decisions stem from the reluctance of the judiciary to get away from the open court and the fact that the credibility of witnesses cannot be effectively examined by affidavits and depositions. *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620 (1944); Note, 99 U. PA. L. REV. 212 (1950-51). The amendment to Rule 56 of the Federal Rules has apparently eliminated the problem. Such an amendment would not appear necessary in West Virginia as the court has indicated it will require the opposing party to present facts to oppose the motion for summary judgment and mere allegations would be insufficient. To hold otherwise would be to avoid the primary purpose of the rule.

Sterl Franklin Shinaberry

**Sales—Persons Protected by Warranties Under the Uniform
Commercial Code—Employee of Buyer Held Not Protected**

P, a bartender of a fraternal lodge, was injured by flying glass when an unopened bottle of carbonated soda water exploded as it was standing behind the bar. The soda was bottled, sold and delivered by *D* to *P*'s employer. *P* sued for breach of implied warranties of fitness and merchantability. The trial court sustained *D*'s demurrer to the complaint. *Held*, affirmed. The manufacturer's implied warranties of fitness and merchantability does not extend to an employee of the purchaser under UNIFORM COMMERCIAL CODE § 2-318. *Hochgertel v. Canada Dry Corp.*, 187 A.2d 575 (Pa. 1963).

The decision of the instant case may have great impact in West Virginia, due to the West Virginia Legislature's recent passage of the Uniform Commercial Code. The issue now is, will the West Virginia Court extend warranties to third party beneficiaries beyond the provisions of the Code?

There is a great deal of authority to the effect that there can be no implied warranty without privity of contract, and that a manufacturer is not liable for breach of warranty to third persons who are strangers to the contract of manufacture or sale for the results of any defects which may later develop in his product. *Turner v. Edison Storage Battery Co.*, 248 N.Y. 73, 161 N.E. 423 (1928); *Chysky v. Drake Bros. Co.*, 235 N.Y. 468, 139 N.E. 576 (1923); Annot., 27 A.L.R. 1533 (1923).

While the West Virginia court has never specifically decided a case on this point there is dictum that a seller's implied warranty does not inure to the benefit of parties other than the purchaser. *Burgess v. Sanitary Meat Market*, 121 W. Va. 605, 5 S.E.2d 785 (1939).

This, however, has been changed by the Uniform Commercial Code. Section 2-318 states that; "... warranty . . . extends to any natural person who is in the family or household of his buyer or who is his guest in his home if it is reasonable to expect that such person may use . . ." the goods. "A seller may not exclude or limit the operation of this section."

There is a growing modern trend holding that privity is unnecessary to warranty liability. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). In sustaining recovery in the *Henningsen* case, the court proposed the establishment of a cause of action in favor of the buyer's family and all others whose use is with the buyer's consent. Since this group is within the distribution chain and is one of the targets of advertising, the manufacturer and the dealer should be made liable to them on the same consideration on which liability to the buyer is established. In similarly extending the dealer's liability, the Uniform Commercial Code, which the court in the *Henningsen* case cited as a persuasive analogy, expresses a desire to free "beneficiaries (of the warranties) from any technical rules as to privity". UNIFORM COMMERCIAL CODE § 2-318, Comment 2.

Once liability is predicated on a weighing of the interests, with privity no longer a factor of decision, it seems that the position of the court in the *Henningsen* case is more desirable. Recognizing the realities of present day mass marketing, the court concluded that a remote manufacturer who puts an article in the stream of trade and creates demand for it by advertising should be held to guarantee his product to the ultimate consumer. *Henningsen v. Bloomfield*

Motors, Inc., supra. This is similar to the theory that the warranty "runs with the goods" from the manufacture to the consumer. *Coca Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927).

Once privity is no longer a factor of decision, it would seem that the warranty should extend to any person who can reasonably be expected to use the product. The best argument for this position is the "risk-spreading" theory, which maintains that the manufacturers, as a group and industry, should absorb the losses which must result in a complex society from the use of their products because they are in the better position to do so, and through their prices to pass such losses on to the society as a whole. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2 453, 462, 150 P.2d 436, 441 (1944).

In applying Section 2-318 of the Uniform Commercial Code to third party beneficiaries a court must get away from the contract concept of warranty. There is little question that, unless there is privity, liability to the consumer must sound in something other than contract. Originally, an action grounded on breach of warranty, sounded in tort rather than contract. Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888). It was not until late in the eighteenth century that a contract action would lie for breach of warranty. Today, because of this mistake in legal history, warranty has become a hybrid of both tort and contract and may operate between parties not in privity of contract. Lambert, *Crumbling of the Citadel: Strict Warranty Liability in Advertised Product Cases*, 481 INS. L. J. 94 (Feb. 1963). For a detailed comment see Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1126-27 (1960).

There is some indication that a few courts are adopting this view when they say that the warranty is not the one made on the original sale, and does not run with the goods, but it is a new and independent one made directly to the consumer, and that it does not arise out of or depend upon any contract, but is imposed by law as a matter of policy. *Markovich v. McKesson & Robbins, Inc.*, 106 Ohio App. 265, 148 N.E.2d 181 (1958); *La Hue v. Coca Cola Bottling, Inc.*, 50 Wash. 2d 645, 314 P.2d 421 (1957).

New York has recently breached the battlements of the "citadel of privity" by overruling the holding in *Turner v. Edison Storage Battery Co., supra* (express warranty recovery required privity) in holding that privity of contract is not essential to the maintenance of an action against a manufacturer for breach of express warranty.

Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962). The *Randy Knitwear* case has since been relied upon to strike another blow at the concept of privity. The New York court discarded, in a suit by a purchaser of a riveting machine for loss of an eye, the privity rule in an action against a manufacturer for breach of implied warranties of fitness and merchantability. *Hoffman v. Cox*, 229 N.Y.S.2d 485 (Sup. Ct. 1962).

As the West Virginia court prior to the passage of the Uniform Commercial Code has indicated that warranty was based upon privity, it seems doubtful that they will expand upon the action of the legislature and further extend the protection of the Commercial Code. See *Burgess v. Sanitary Meat Market*, *supra*. There is even more indication of this since the West Virginia court recently held that a buyer of a truck, under an express warranty which specifically excluded implied warranties and limited the seller's liability to the replacement of defective parts, could not recover on alleged implied warranty or recover consequential damages. In so holding the court rejected the *Henningsen* case on the basis that West Virginia had no statutory provisions with regard to implied warranties wherein they could come within the principle allowing recovery on the basis of public policy. *Payne v. Valley Motor Sales, Inc.*, 124 S.E.2d 622 (W. Va. 1962). This has been the position of the court in the instant case and also that of the Connecticut court when, in interpreting the language of Section 2-318, it held that a maid was not a member of the buyer's household. *Duart v. Axton-Cross Co.*, 19 Conn. Supp. 188, 110 A.2d 647 (1954).

While the draftsmen of the Commercial Code have not extended strict warranty liability beyond the family, household or guest of the buyer, there was a conscious determination on their part to leave this volatile proposition to evolving case law. Thus, the argument presented in the instant case, that the court cannot extend the coverage of strict warranty liability because the Commercial Code does not go beyond this point, is fallacious. The draftsmen of the Commercial Code concluded that the case law in this area was in too much of a state of flux to attempt to codify it at the present time. To make such an important policy decision at the outset might jeopardize the entire development of uniform commercial law. The draftsmen in remaining neutral on this point have left the decision to the policy making determination of the various courts to decide

how far they will go in extending coverage beyond that of Section 2-318. The maxim of statutory construction which requires that which is not expressly included to be excluded should not be followed in this instance as it was the intent of the legislature (through the draftsmen of the Commercial Code) to leave the door open for each court to make its own policy determination. *UNIFORM COMMERCIAL CODE* § 2-318, comment 3.

Earl Moss Curry, Jr.

**Sales—Uniform Commercial Code—Consideration for
Modification of a Contract**

D, a Massachusetts corporation, sold an airplane to *P*, a Connecticut resident. Prior to the due date of the first payment the airplane developed engine trouble. To alleviate *P*'s financial burden as a result of the installation of a new engine, *D*, through its officers, orally agreed to a modification of the contract. For the first year the payments would be 100 dollars per month rather than 200 dollars per month. Approximately four months later, *D*'s president requested a return to the higher payments. *P* refused to comply and *D* repossessed the airplane. Decree awarded *P* damages. *Held*, affirmed. *MASS. ANN. LAWS* ch. 106, § 2-209(1) (Supp. 1958), *UNIFORM COMMERCIAL CODE* § 2-209 (1), provides that "an agreement modifying a contract within this Article needs no consideration to be binding." *Skinner v. Tober Foreign Motors, Inc.*, 187 N.E.2d 669 (Mass. 1963).

The principal case represents only one of the changes of contract law in sales under the Uniform Commercial Code. With the enactment of the Code in West Virginia a new approach must be taken to transactions in goods. The general law relative to contracts supplements the provisions of the code unless displaced by particular provisions. *UNIFORM COMMERCIAL CODE* § 1-103.

Prior West Virginia law required consideration for modification of a contract. *Thomas v. Mott*, 74 W. Va. 493, 82 S.E. 325 (1914), set forth the principle that "no promise is good in law unless there is a legal consideration in return for it." It is not valuable consideration to do that which one is legally bound to do because the promisor receives nothing more than he is already entitled to. See, *Bischoff*